

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-2065

Docket No. 75-2065

To be argued by:

MICHAEL A. CORRIERO

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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GUS SCLAFANI,

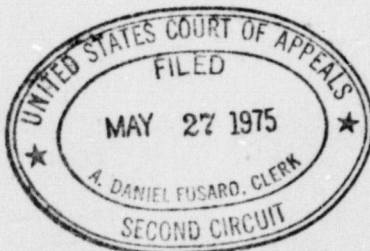
Petitioner-Appellant,

- against -

H. R. HOGAN, Warden, U.S.
Penitentiary, Atlanta, Georgia,

Respondent-Appellee.
-----X

PETITIONER-APPELLANT'S BRIEF



George J. Castrataro
Of Counsel

CASTRATARO, HERMAN, BEININ & CORRIERO
110 East 59th Street
New York, New York 10022

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STATEMENT

The Petitioner-Appellant, pursuant to 28 USC § 2255, petitioned the District Court for the Southern District of New York for an order dismissing the indictment, setting aside the verdict and vacating the sentence in the case of U.S. v. Sclafani, 71 Cr. 1243. The petition was grounded upon the assertion that the Special Attorneys who presented the case to the Grand Jury and obtained the indictment were without authority to do so and that the trial court therefore lacked jurisdiction. The Petitioner-Appellant now appeals from the order of Judge Edmund L. Palmieri denying the petition.

FACTS

On November 3, 1971 the Petitioner-Appellant (hereinafter Appellant) was indicted for several violations of federal statutes. After a jury trial on October 11, 1972, the Appellant was convicted of violations of 18 USC § 371, 18 USC §§ 893,

894, 26 USC § 7201 and 18 USC § 1001. On December 4, 1972 the Appellant was sentenced as follows:

1. Concurrent prison terms of ten years (three terms) and five years (three terms).
2. An additional five-year term to run consecutively with the other five-year terms.
3. Three committed fines of \$10,000.

The original indictment was made by the Grand Jury on November 3, 1971. The attorney who presented the case is, upon information and belief, William I. Aronwald, then one of the Special Attorneys assigned to the Strike Force. Mr. Aronwald or others unknown to the Appellant was appointed as a Special Attorney prior to November 3, 1971 by a letter from the Office of the Deputy United States Attorney General.

JURISDICTION

The jurisdiction of this court is based on 28 USC § 1291 which provides for appeals from final orders of the United States District Courts. The final order appealed from herein was made on March 19, 1975 and designated EP CR 32 Memo 542.

QUESTIONS PRESENTED

1. Was the Special Attorney properly authorized to conduct the proceedings herein?
2. Should the indictment, verdict and sentence herein be dismissed and vacated in this case?

SUMMARY OF ARGUMENT

Point One: The Appointment of Special Attorneys
 herein was improper

Point Two: The presence of an unauthorized attorney
 in the proceedings was violative of
 Petitioner-Appellant's rights

Point Three: Since the indictment was illegally
 obtained, the verdict and sentence
 should be vacated

POINT ONE: THE APPOINTMENT OF SPECIAL ATTORNEYS HEREIN
WAS IMPROPER.

The integrity of Grand Jury proceedings is one of the keystones of our due process system. The number and kinds of persons permitted to take part in or attend such proceedings are strictly limited. Generally, Attorneys General, United States Attorneys and their assistants are the only individuals who are entitled to present cases to the federal Grand Juries. Yet, Congress and the Attorney General have recognized the need for "Special Attorneys" for certain cases. The Attorney General has the power to delegate any of his functions by his specific direction. 28 USC 515 (a). In this case, the Attorney General attempted to appoint the Special Attorney by letter, the form of which was the subject of controversy in United States v. Williams, Docket No. 74 Cr. 47-w-1 (W.D. Mo.)

It should be clear that the meaning of the statute and derivative exercise by the Attorney General did not contemplate a complete abdication by the U.S. Attorneys in the prosecutorial functions. Yet, for whatever reason, "Strike Forces" have been created with "Special Attorneys" at their head and on their staffs, which effectively have superseded the function of the U. S. Attorneys.

The first 100 years of the United States saw that the power to prosecute federal cases was entirely vested in a District Attorney appointed by the President. See, United States v. Rosenthal, 121 Fed 862, 873 (S.D. N.Y. 1903). Then, as stated

above, the power of the Attorney General in this area was codified and expanded to include specially appointed attorneys. The question remained, however, as to how specific any such appointment must be. The case law has not indicated any consistent rule in this regard. The narrowest rule was perhaps that enunciated in United States v. Huston, 28 F 2d 451, (S.D. Ohio, 1928), wherein it was held that the appointment must name the defendants as well as the case and the district where the Grand Jury is sitting. This rule, however, was not followed in United States v. Hall, 145 F 2d 781 (9th Cir. 1944), Shushan v. United States, 117 F 2d 110, (5th Cir. 1941) and United States v. Amazon Industrial Chemical Corp., 55 F 2d 254 (D.C. Md 1931). Within the Southern District of New York itself, there is lack of agreement in the cases. United States v. Crispino quashed an indictment obtained by a Strike Force attorney. 74 Cr. 932 (Werker, J. 2-13-75). In United States v. Brown, et al, 74 Cr. 867 (Pollack, J. 2-24-75), Sandello v. Curran, M 11-188 (Tenney, J., 2-27-75), and United States v. Jacobson, 74 Cr. 936 (Frankel, J., 3-3-75) contrary conclusions were reached.

Nevertheless, there is a common thread running through all these cases, namely, that the letter of appointment must at least state the type of cases to be prosecuted. The Special Attorney herein was not therefore properly authorized to present this matter to the Grand Jury. His letter of appointment stated that he was to prosecute "violations of federal criminal statutes by persons whose identities are unknown to the Department at this time." Nothing, in effect, is specifically set forth in the letter

either as to the scope of investigation, the kinds of crimes or the persons involved. The appointment was an attempt to give all powers and authority to these Special Attorneys without limit or guidelines. This would subvert the obvious constitutional restraint on Grand Jury proceedings and unnecessarily broaden the Strike Force powers at the expense of the traditional structure of our prosecutorial system. See, United States v. 1960 Acres of Land etc., 54 F. Supp. 867 (S.D. Cal. 1944); United States v. Cohen, 273 F. 620 (D.C. Mass. 1921).

Surely, Congress intended to facilitate prosecutions, but query, how far can we go to make prosecutions easier? Are the guidelines so broad as to render any limit on the appointment of Special Attorneys meaningless and the traditional role of U. S. Attorneys as prosecutors useless? The answer, we submit, must be in the negative in order to protect the interest of our citizenry in the preservation of constitutional proscriptions in criminal proceedings.

POINT TWO: THE PRESENCE OF AN UNAUTHORIZED ATTORNEY
IN THE PROCEEDINGS WAS VIOLATIVE OF THE
PETITIONER-APPELLANT'S RIGHTS.

Inasmuch as the appointment herein was improper, the presence of the Special Attorney in these proceedings was violative of the Appellant's rights. It cannot be gainsaid that the tradition of secrecy in grand jury proceedings is one of the strongest safeguards of an individual's rights in this country. It is codified by 18 USCA Rule 6 (d) which sets forth the persons entitled to be present before the Grand Jury. An unauthorized attorney or one whose authority is not established would not be so entitled. United States v. Crispino; supra. The appearance of an unauthorized person is grounds for dismissal of the indictment. United States v. Heinze, 177 F. 770 (2nd Cir., 1910); Latham v. United States, 226 F. 420 (5th Cir., 1915). In United States v. Carper, 116 F. Supp. 817 (D. D.C. 1953) it was held that the presence of unauthorized persons in the grand jury room results in a presumption of prejudice to the defendant. How much stronger is that presumption if the person without authority seeks to prosecute the case: his presence has a direct influence on the deliberations of the jury.

POINT THREE: SINCE THE INDICTMENT WAS ILLEGALLY OBTAINED,
THE VERDICT AND SENTENCE SHOULD BE VACATED.

The improper process involved with the indictment herein taints all the proceedings flowing therefrom. The conviction and sentence must, a fortiori, be illegal, the trial having been improperly based on an illegal indictment. Therefore, the verdict and sentence should be vacated.

CONCLUSION

All proceedings herein having been undertaken illegally, the order of the District Court denying Appellant's motion was in error and the indictment, verdict and sentence should be vacated.

DATED: New York, New York
May 19, 1975

Respectfully submitted,

CASTRATARO, HERMAN, BEININ & CORRIERO

George J. Castrataro,
Of Counsel

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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Petitioner-Appellant,

- against -

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AFFIDAVIT OF SERVICE

Docket No. 75-2065

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

ROSEMARY MAZZARELLA, being duly sworn, deposes and
says:

I am not a party to the proceeding; am over the age
of 21 years and reside at West Islip, New York.

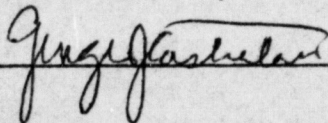
That on the 27th day of May 1975, I served the
within APPELLANT'S BRIEF and APPENDIX upon the following named individuals
at the addresses designated by said individuals for that purpose by
depositing a true copy of same enclosed in a postpaid, properly addressed
wrapper to each, in an official depository under the exclusive care and
custody of the United States Post Office Department within the State of
New York.

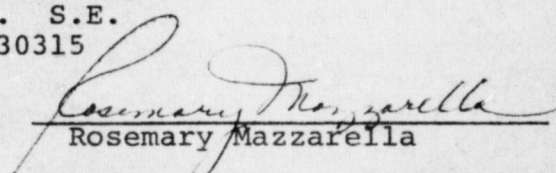
William I. Aronwald, Esq.
Department of Justice
New York Strike Force
26 Federal Plaza
New York, New York 10007

H. R. Hogan
Warden
United States Penitentiary
601 McDonough Blvd. S.E.
Atlanta, Georgia 30315

SWORN TO BEFORE ME THIS

27TH DAY OF MAY, 1975




Rosemary Mazzarella

GEORGE J. CASTRATARO
NOTARY PUBLIC, State of New York
No. 52-5649520
Qualified in Suffolk County
Commission Expires March 30, 1976